IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-610

COLUMBUS BOARD OF EDUCATION, et als.,

Petitioner,

v.

PENICK, et als.,

Respondent.

No. 78-627

DAYTON BOARD OF EDUCATION, et als.,

Petitioner,

v.

BRINKMAN, et als.,

Respondent.

BRIEF OF THE FAIR HOUSING COUNCIL OF BERGEN COUNTY, NEW JERSEY *AMICUS CURIAE*

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Interest of Amicus

The Fair Housing Council of Bergen County, New Jersey, is a non-profit membership organization. Its 4,000 members are caucasian and minority citizens committed to the goal of equal opportunity in housing and the benefits to be derived from an integrated living experience.

The Council provides housing counselling and assistance to minority families seeking housing within Bergen County and, where necessary, provides legal assistance to individuals who have been denied housing because of their race. In addition, the Council is challenging the racial steering of real estate brokers throughout the County in a federal class action suit.

The goals and interests of the Fair Housing Council have been seriously impeded by patterns of school segregation. White families are routinely discouraged by real estate brokers from moving into integrated neighborhoods because of the racial composition of those schools. Black families, on the other hand are told that they will not be "comfortable" in white communities and that their children will be ostracized in the "white" schools of such neighborhoods. The racial composition of the schools is the single most important factor defining which neighborhoods are "open" to blacks. In the absence of meaningful desegregation of the schools, the residential choices of black families will continue to be restricted. The practices and techniques of racial exclusion are not unique to Bergen County, but may be found all across the nation. Indeed, they were demonstrated to exist in the instant cases.

Reversal of the Sixth Circuit's opinions implementing systemwide desegregation remedies will be a signal to communities throughout this country to continue to "stonewall" desegregation efforts and to maintain their exclusive white school systems. For these reasons, the Fair Housing Council of Bergen County joins as *amicus curiae* in urging affirmance of the Circuit Court's Opinions.

Amici have received the written consents of petitioners and respondents to file this brief. Those consents have been filed with the Clerk of the Court concurrently with the filing of this brief.

ARGUMENT

I.

A Systemwide Remedy Is Mandated Where, as in the Cases at Bar, Petitioners Have Failed to Meet Their Burden of Proving That Despite Their Intentional Segregative Acts the Same Degree of Racial Segregation Would Exist in the Schools Because of Residential or Other Factors Which They Did Not Control.

Petitioners have failed to show that the existing racial imbalance within their respective school systems was the result of social dynamics or acts of others for which they had no responsibility. *Penick* v. *Columbus Bd. of Educ.*, 429 F. Supp. 260, *aff'd* 583 F. 2d 787 (6th Cir. 1978); *Brinkman* v. *Gilligan*, 583 F. 2d 243 (6th Cir. 1978). This failure is grounded on two erroneous assumptions. First, Petitioners maintain that residential patterns have completely negated any segregative impact which any intentional segregative acts of the school board might have had. Second, they maintain that the mere passage of time since the last "alleged" discriminatory act of the school board makes any effect of such action so attenuated as to excuse liability. Both assumptions fly not only in the face of the legal standards heretofore announced by this Court, but in the face of what this Court has termed a "common sense" understanding of the dynamic interaction between residential and school patterns. *Keyes* v. *School District No. 1, Denver, Colo.*, 413 U.S. 189, 203 (1973).

A. Petitioners May Not Rely on Residential Patterns to Excuse or Negate Their Intentional Acts of Segregation Within the School System.

In *Penick* v. *Columbus Bd. of Education, supra* (6th Cir. 1978), the Court of Appeals for the Sixth Circuit affirmed the finding of the lower court that at the time of *Brown I,*

Columbus Petitioners were operating a dual school system and hence were under an affirmative duty to desegregate that system. *Id.* at 798-799, *aff'g*, 429 F. Supp. at 260-61. Similarly in *Brinkman* v. *Gilligan, supra,* another panel of the Sixth Circuit reached the same conclusion with respect to the Dayton schools, setting aside the clearly erroneous findings of the district court to the contrary. 583 F. 2d at 247. Both Courts proceeded to find that plaintiffs-respondents had, at the least, carried their prima facie burden of establishing intentional segregation within a substantial portion of the school district, *Brinkman* v. *Gilligan, supra,* 583 F. 2d at 258. *Penick* v. *Columbus Bd. of Educ., supra,* 583 F. 2d at 815. Therefore the burden shifted to Petitioners to overcome the presumption that the current racial composition of the school population reflected the systemwide impact of these violations. *Keyes, supra,* 413 U.S. at 208. Petitioners have failed to meet that burden. Significantly, the Court of Appeals was not required in either of the cases to rely upon the *Keyes* presumptions due to the direct nature of the proof.

Petitioners argue herein, that whatever effects their actions may have had on the racial composition of the schools have been negated by residential patterns. Hence a systemwide remedy is not appropriate. Petitioners' argument misconstrues the applicable burdens in fashioning a school desegregation remedy. Plaintiffs' burden is to establish a systemwide violation within a substantial portion of the school district. *Keyes, supra,* 413 U.S. at 211, *Dayton Bd. of Educ.* v. *Brinkman,* 433 U.S. 406, 420 (1977). Plaintiffs are under no burden to establish the actual effect of such violations on the residential patterns of the school district. Rather, a school board which has been found guilty of a constitutional violation is in the same position as any other defendant who wishes to "mitigate damages". It must show by a preponderance of the evidence that the

same result would have been reached in the absence of its impermissible actions. *Mt. Healthy City Bd. of Educ.* v. *Doyle,* 429 U.S. 274, 287 (1977); *Arlington Heights* v. *Metropolitan Housing Corp.,* 429 U.S. 252, 271, at n. 21 (1977).

While Petitioners' burden at this stage of a school desegregation case is a heavy one, which may be difficult to meet, *Evans* v. *Buchanan,* 447 F. Supp. 982 (D. Del. 1978), it is consistent with equitable principles of fairness. It is only appropriate that after plaintiffs in a school desegregation case have borne the increasingly heavy burden of establishing intentional *de jure* segregation in a significant portion of the school district or the entire system that the offending party should bear the burden of restricting any remedy flowing from that violation.

Petitioners have failed to show either that the same degree of segregation would have existed in the Columbus and Dayton School systems, absent their actions, or that the remedies approved by the courts below impose a greater degree of desegregation on the Dayton and Columbus systems than would have been possible absent the remedying of Petitioners' unconstitutional acts. Rather, Petitioners claim to meet their burden by pointing to the existence of residential segregation as "proof" that the schools would have been segregated anyway. Avowing no control over housing discrimination, Petitioners conclude that they no longer have any responsibility for the system which their acts put in place.

This approach ignores the symbiotic relationship between schools and housing patterns which was recognized by this Court in *Swann* v. *Bd. of Educ.,* 402 U.S. 1 (1971).

> The construction of new schools and the closing of old ones are two of the most important functions of local school authorities . . . The result of this will be a deci-

> sion which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of the people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner city neighborhoods.

Id. at 20-21.

Further, this Court noted that the building and closing of schools in certain areas

> does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning" further lock the school system into the mold of separation of the races.

Id. at 21.

In the instant cases, the records below clearly establish Petitioners' intent and success in establishing and maintaining racially identifiable schools throughout. By their selection of school sites, closing of schools, assignment of faculty, and busing of neighborhood black youths past white schools, Petitioners acted to insure that schools would open and remain racially identifiable. Similarly, Petitioners acted to insure that white children, regardless of their residence in or near integrated neighborhoods could attend "white" schools regardless of whether such attendance zones were contiguous or not, and regardless of whether nearby "black" schools were under-utilized. See RBP* at

* RBP refers to Respondent's brief in *Penick;* RBB refers to Respondent's brief in *Brinkman.*

pp. 10-96, RBB at pp. 12-73. *Penick* v. *Columbus Bd. of Educ., supra,* 583 F.2d at 795-798; *Brinkman* v. *Gilligan, supra,* 583 F.2d at 249-256.

The impact of Petitioners' actions on their school systems cannot be isolated from their reciprocal impact on the racial composition of neighborhoods surrounding the schools. Referring to many of the tactics used by Petitioners herein, this Court in *Keyes, supra,* emphasized the interaction of school policies and residential segregation

> . . . the use of mobile classrooms, the drafting of student transfer policies, the transportation of students and the assignment of faculty and staff, on racially identifiable bases, have the clear effect of earmarking schools according to their racial composition, and this, in turn, together with the elements of student assignment and school construction, may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools.

Keyes, supra, 413 U.S. at 202.

The school which Petitioners have established as racially identifiable remains in the community long after the original residents have moved. It serves as a central magnet in defining the neighborhood. Families in search of housing often use school attendance zones in making their housing decisions.[1] Substantial evidence in *Penick* v. *Columbus, supra,* that the nature of the schools is an important consideration in real estate transactions, buttresses this conclusion.

In making housing choices, white families often assume that districts with integrated schools are inferior not only

[1] Taeuber, *Demographic Perspectives,* 21 Wayne L. Rev. 833, 843 (1975).

because it is believed that school authorities rapidly lose interest in integrated or predominantly black schools, see e.g. Campbell and Maranto, "The Metropolitan Educational Dilemma," The Manipulated City 305, 310, Gale and Moore ed. (1975), but because whites continue to operate under the misperception that blacks and racial minorities are inferior.[2] This assumption has been bolstered and encouraged by the treatment which black students have encountered from school officials. As the district court in *Brinkman* v. *Gilligan*, 446 F. Supp. 1232, (SD Ohio 1977) acknowledged, such treatment had been "at least inhumane and by present standards reprehensible. *Id.* at 1237.

Segregated school patterns also impact on the decisions of minority homeseekers. As *amici*'s experience in securing housing for minority families within predominantly white areas demonstrates, such families are often deterred from moving into such communities because their children may be the only minority students in the "neighborhood school." In the absence of true desegregation of the schools, such children remain isolated and subject to being ostracized by their classmates. This Court has recognized the courage required of black children to break with tradition to get into white schools. *Green* v. *County School Bd. of New Kent Cty.*, 391 U.S. 430, 435-6 (1968).

In the absence of segregated residential patterns, Petitioners' neighborhood school system may have been appropriate:

> All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. *But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation.*

[2] See note 7, *infra*, and accompanying text.

Swann, supra, 402 U.S. at 28. (emphasis supplied). As the Sixth Circuit has held, this is precisely the situation in the cases at bar. Further, Petitioners' alleged neighborhood school system was quickly abandoned when the neighborhood was an integrated one.

Any argument which *Dayton* Petitioner may make denying the interaction of school policies and residential composition is belied by their own resolution allegedly calling for faculty desegregation:

> The administration will continue to introduce negro teachers, gradually, into schools having mixed or white populations when there is evidence that such communities are ready to accept negro teachers.

Such resistance could only have come from the white community since black parents were consistently petitioning the school board for the integration of the schools. Clearly the school board was aware that the introduction of black faculty would change the identity of a school within a white community trying to maintain its white identity. As Professor Taeuber has noted:

> Assignment of a black principal and the shifting of a school attendance boundary are highly visible deliberate acts that may imply racial consequences to homeseekers, landlords with vacancies, and banks with funds to loan.

Taeuber, *supra*, note 1 at 845.

Rather than confront the dynamic between school and residential segregation, Petitioners would have this Court accept the proposition that the primary determinants of residential patterns are "[e]conomic pressures and voluntary preferences". *Austin Independent School District* v.

U.S., 429 U.S. 990, 994 (1976). This position is unsupported by any evidence produced by Petitioners. Moreover it is directly contradicted by sociological research in this area and by evidence introduced by Respondents at trial.[3] Further, to the extent that other governmental agencies may have contributed to residential segregation, e.g. discriminatory policies of FHA and VA mortgages,[4] thereby exacerbating the degree of racial isolation within the schools, it is appropriate that the effects of such actions be remedied within the school desegregation plan. *U.S.* v. *Bd. of School Com'rs.*, 573 F.2d 400 (7th Cir. 1978). For "the State cannot avoid the Fourteenth Amendment by fragmenting responsibility. If the state has contributed to the separation of the races, it has the obligation to remedy the constitutional violations." *Id.* at 410.

This Court has not reached the question of whether "a showing that school segregation, as a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree". *Swann, supra,* 402 U.S. at 23. In the cases at bar, however, Petitioners *have been adjudged guilty of intentional discrimination.* They cannot be allowed to restrict the remediation of those violations by claims that other state agencies were also guilty! Whether it was the school district acting alone, or in concert with other governmental

[3] Taeuber and Taeuber, Negoes in Cities (1965), p. 94; Housing Segregation in the Tri-State Region, Regional Plan Association, 235 East 45 Street, N.Y., N.Y. 10017 (1978) (Fewer than one-fifth of the residents of segregated black areas prefer to live in segregated black areas; only about six percent (6%) of the racial segregation in the New York, New Jersey and Connecticut region is due to income).

[4] See, U.S. Commission on Civil Rights, Equal Opportunity in Suburbia, July, 1974, p.36.

agencies, the effect is the same: an unconstitutional school system which must be desegregated "root and branch."

In the instant cases, Petitioners have failed to rebut the direct proof and inference that their segregative actions infected not only the schools systems but residential patterns. Nor have they demonstrated that residential patterns developed independently of other state action. They therefore cannot claim that some "unknown or unknowable" factor created the residential patterns which they now claim justify the maintenance of a significant number of one race schools within their systems.

Amici respectfully urge this Court to affirm the remedies ordered by the Sixth Circuit as Petitioners have failed to carry their burden of demonstrating that the degree of desegregation ordered below would not have existed in the absence of Petitioners' actions.

B. In the Absence of a Showing by Petitioners That They Have Met Their Affirmative Duty to Desegregate the Schools They Cannot Claim That the Effects of Their Intentional Segregative Actions Are So Attenuated as to Deny Respondents Meaningful Relief.

As indicated in the preceding point, separate panels of the Sixth Circuit found that both the Dayton and Columbus school boards were operating dual systems at the time of *Brown I. Supra* at 3-4. Pursuant to this Court's mandate in *Green* v. *Country School Bd. of New Kent County,* 391 U.S. 430 (1968), therefore, Petitioners had an affirmative duty to desegregate their respective school systems "root and branch".

All of the lower courts, including the district court in *Dayton* v. *Brinkman, supra,* 446 F. Supp. at 1240 agreed that defendants had utterly failed to meet this duty. Petitioners, however, ask this Court to ignore not only their

failure to comply with *Green* but the fact that they have acted with actual or foreseeable knowledge so as to exacerbate the degree of racial segregation within the schools. Although Petitioners have put in place segregated school systems, they argue that the mere passage of time has sufficiently attenuated their acts from any segregative effects remaining in the system. As a result they claim the "right" to maintain a significant number of one race schools within the districts. But Petitioners have locked in a system of school segregation. They cannot now refuse to open the doors.

In *Keyes* v. *School District No. 1, Denver, Colo.*, 413 U.S. 189, this Court

> reject[ed] any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less "intentional".
>
> This is not to say however, that the prima facie case may not be met by evidence supporting a finding that a lesser degree of segregated schooling in the core city area would not have resulted even if the Board had not acted as it did.

Id. at 211.

To the extent that Petitioners rely on this Court's enunciation of the *Dayton* standard's application to cases where "mandatory segregation by law of the races in the schools has long since ceased" as altering the *Keyes* standard, we urge its rejection.

This Court suggested in *Swann* v. *Bd. of Educ.*, 402 U.S. 1 (1971) that at some point in time the relationship between past segregative acts and present segregation may be so attenuated as to be incapable of supporting a finding of *de jure* segregation, *Id.* at 31-32. By the time a court addresses the remedial phase of a school desegregation case this finding of intentional segregation has already been made. Any "attenuation", therefore, is not applicable in the remedial stage of litigation in the absence of a showing that the offending school board has acted affirmatively to undo the effects of its actions.

Unless Petitioners can show that they have acted affirmatively, no amount of time will so attenuate the effects of the Boards' actions. Once a segregated system is put in place, it does not "just go away", nor as we have argued in the preceding section can the Board disclaim responsibility for the reciprocal effect the segregated system has on residential patterns within the area. As this Court has made clear "a connection between past segregative acts and present segregation may be present even when not apparent." *Keyes, supra,* 413 U.S. at 211. Therefore, the close examination of any connection between Petitioners' past actions and present segregation, mandated by this Court, cannot be met by Petitioners' claim that the mere passage of time relieves them of any responsibility for their actions. *Id.*

Amici submit that any deference to Petitioners' position would be an unfortunate reminder of this Court's decision in *Plessy* v. *Ferguson,* 163 U.S. 537 (1896) which not only gave approval to a Jim Crow system that was already in place but which gave legal and moral authority for the great expansion of Jim Crow. C. Woodward, *The Strange Career of Jim Crow* (3rd ed. 1974). "[P]resent events have roots in the past", *United States* v. *Oregon State Med. Soc.,* 343 U.S. 326, 332 (1952) and until Petitioners prove

that those roots have been destroyed their effects on the present cannot be denied.

For these reasons *amici* urge this Court to reaffirm its commitment to the affirmative duty announced in *Green* and to explicitly reject any argument that an offending school board that has not conformed to that mandate can rely on the mere passage of time to avoid the implementation of a meaningful remedial order.

II.

The Systemwide Remedies Ordered Below Reflect a Proper Balancing of the Individual and Collective Interests.

Respondents have demonstrated beyond doubt the legal sufficiency of the proofs below in mandating a systemwide remedy pursuant to this Court's recent pronouncement in *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406 (1977). This remedy reflects not only a careful tailoring of the remedy to meet the constitutional violation but a proper "balancing of the individual and collective interests" involved in school desegregation cases. *Swann* v. *Charlotte Mecklenburg Board of Education,* 420 U.S. 1, 16-17 (1971).

In view of recent pronouncements of several members of this Court reflecting an increasing concern with the protection of individual interests in the formulation of school desegregation remedies, however, *amici* are concerned that the collective interests involved in this Court's review of the pending cases be emphasized.

In *Brown* v. *Board of Education,* 347 U.S. 483, 493 (1954) this Court stressed the importance of public education:

> It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

and recognized the far-reaching consequences of school segregation:

> To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

Id. at 494.

As a result, the Court declared that

> "in the field of public education, the doctrine of separate but equal has no place."

Id. at 495.

This Court's decision in *Brown I* was not merely a recognition of the importance which education plays in guaranteeing minority citizens full participation in society. It was a reaffirmation of this nation's commitment, over one hundred years ago, to eliminate the badges and indicia of slavery. The years that followed *Brown I* brought a legalistic form of equality to blacks and other minorities that has in large measure been a form without substance. The full societal participation which is the hallmark of true equality has yet to be achieved. In 1968 the Kerner Commission[5] found us moving rapidly toward two societies,

[5] Report of the National Commission on Civil Disorders (1968).

separate and unequal. The prophesy of the Kerner Commission is borne out by economic and educational data which demonstrate unmistakably that blacks and similar racial minorities continue to be deprived of full participation in our society.[6] The most dramatic effects of this dual system are evidenced by the decay of our inner cities, racial hostility, and race riots.

While a school desegregation remedy "can only carry so much baggage", *Swann, supra,* 402 U.S. at 22, the interaction between education and the socio-economic position of racial minorities must be foremost in the Court's attention in reviewing desegregation remedies. The collective interest is not only in ensuring equality of educational opportunity but in the concomitant effects such opportunity will have on breaking down this dual social-economic structure as well. *Milliken* v. *Bradley,* 418 U.S. 717, 780 (1974) (White J., dissenting).

Moreover, the primacy of the collective interest in undoing the effects of state imposed segregation must be considered against the historical background of this country. The legally required separation of the races was not restricted to the schools but carried over into all aspects of public and even private life, *see Loving* v. *Virginia,* 388 U.S. 1 (1967); *McLaughlin* v. *Florida,* 379 U.S. 184 (1964),

[6] The 1975 median income for white families was $14,268 while for minority families it was only $9,321. U.S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States 405 (Table 650) (1976). As of that same year, 57.5% of the black population in the United States over 25 years of age had not graduated from high school and 12.3% had attended school for less than five years. For the entire population the corresponding figures were 37.5% and 4.2%. *Id.* at 123 (Table 198). 14.5% of the white population who were at least twenty-five years old, but only 6.4% of the black population, had completed four or more years of college. *Id.* at 123 (Table 199).

assuring that when blacks and whites interacted at all, it would be with assumptions of black inferiority.

Twenty-five years after *Brown I* our nation's schools are still segregated. While some progress has been made in Southern states, no comparable progress has been made in many Northern cities. *Keyes* v. *School District No. 1, Denver, Colo.,* 413 U.S. 189, 218-19 (Powell, J.) This continued separation of the races confirms white misperceptions that racial minorities, and blacks in particular, are inferior. These misperceptions in turn fuel the continuing exclusion of minorities.[7]

It is only when a school desegregation remedy "promises realistically to work, and promises realistically to work *now*" *Swann, supra,* 402 U.S. at 20 (citing *United States* v. *Montgomery Bd. of Educ.,* 395 U.S. 225, 235-36 (emphasis in the original) that the collective interest in adherence to the constitutional norm and in breaking down the dual system that continues to enslave minority citizens can be met.

This Court has decreed that the remedy should insure as far as possible that the individual victim is restored to the position he or she would have occupied but for the discrimination. *Milliken* v. *Bradley, supra,* 418 U.S. at 746. Insofar as blacks have been stigmatized and humiliated by the operation of segregated school systems, no court remedy will be able to "make them whole."

[7] The interdependence of social institutions and racial stereotypes is a generally accepted principle in social psychology. *See,* e.g., G. Allport, *The Nature of Prejudice* (1954). G. Simpson & J. Yinger, *Racial and Cultural Minorities: An Analysis of Prejudice and Discrimination* (4th ed. 1972) (Once fixed in the culture, the stereotyped mental pictures of other groups) react back upon [the culture], guiding the interaction of the groups involved. *Id.* at 153 (footnote omitted).

But the victims of discrimination should not be made to suffer further humiliation and exclusion because of undue concern for parents and children who may suffer some inconvenience because of a school desegregation remedy. Petitioners convey the impression that the "inconvenience" doctrine provides a basis for reversal. However, this Court squarely faced and rejected that doctrine in *Swann, supra,* 402 U.S. at 24:

> Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be *administratively awkward, inconvenient,* and *even bizarre* in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems. (Emphasis added)

Amici do not dispute the interests or concerns voiced by members of this Court with respect to school desegregation remedies.[8] When these concerns are voiced without equal emphasis on the collective interests noted above, however, such statements may be read by recalcitrant school boards as encouragement for their continued resistance to appropriate school desegregation remedies. The cases currently

[8] Yet, *Swann,* 402 U.S. at 15 instructs:

"Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."

before this court are exemplary. Petitioners herein attempt to characterize a desegregation plan which limits pupil transportation to a maximum twenty minute bus ride as unduly burdensome on school officials and students. *Amici* submit that such a characterization is not only inconsistent with the opinions of this Court but misconstrues the nature of a school desegregation remedy.

To construe a school desegregation remedy as a "burden" is to define it as a penalty. But the goal of a school desegregation remedy is to *undo* the constitutional violation and to implement a school system that conforms to the mandates of the Thirteenth and Fourteenth Amendments. The benefits of a school desegregation remedy, therefore, accrue to blacks and whites alike.

Amici submit that any inconvenience attributed to the short bus rides contemplated by the Dayton and Columbus remedies is far outweighed by the many benefits of an integrated education. Children educated in an interracial atmosphere are not only better prepared for and committed to the benefits of life in a pluralist society but have the benefit of participating in dialogue with those who may offer a different perspective on learning experiences. *Brown* v. *Bd. of Education, supra,* 347 U.S. at 493-4. As Justice Powell has noted

> "In a pluralistic society such as ours, it is essential that no racial minority feel demeaned or discriminated against and that students of all races learn to play, work, cooperate with one another in their common pursuits and endeavors."

Keyes, supra, U.S. at 242.

Even if *amici* were to accept the characterization of a school desegregation remedy as a burden rather than a

benefit, this Court has noted in another context that "a sharing of the burden of past discrimination is presumptively necessary [and] is entirely consistent to any fair characterization of equity jurisdiction, particularly when considered in light of our traditional view that '[a]ttainment of a great national policy . . . must not be confined within narrow cannons for equitable relief deemed suitable by chancellors in ordinary private controversies.'" *Phelps Dodge Corp.* v. *NCRB,* 313 U.S. 177, 188 (1941); *Franks* v. *Bowman Transp. Co.,* 424 U.S. 747, 777-78 (1976) (footnote omitted). Moreover, the "burden" imposed in northern school desegregation cases is no greater than that borne by southern families. In southern school desegregation cases this Court has not hesitated to order busing to eliminate, not entrench, vestiges of duality, and to bring about integration of school faculties because such plans were the only feasible way of desegregating systems that were in violation of the constitutional norm. *Swann, supra.*

In reviewing school desegregation remedies, this Court has also given deference to the local autonomy of school districts, *Dayton Bd. of Educ.* v. *Brinkman, supra,* 433 U.S. at 410; and cases cited therein. Such deference is certainly appropriate when school boards are operating constitutional systems and when the area of the boards' concern is educational policy. In cases such as the ones currently before this Court, however, we are confronted with local school boards that have maintained segregation and exacerbated racial imbalance for reasons totally unrelated to educational policies. Petitioners have failed to establish that their actions were taken for any reason other than the impermissible one of denying children an integrated education. The actions of these boards have in fact been *ultra vires.* Hence the basis for the traditional deference accorded educators' decisions simply does not apply to the cases presently on review before this Court.

The remedies proposed herein do not require school boards to engage in unnecessary transportation of children. *Keyes, supra,* 413 U.S. at 251 (Powell, J.). Nor have defendant school boards demonstrated that their unconstitutional actions are entitled to continued deference by this Court. Therefore, when these interests are weighed against the collective interests outlined above, the scale tips unfailingly in favor of the systemwide remedies ordered by the Sixth Circuit. This Court should affirm those remedies.

CONCLUSION

Respondents in the instant cases have borne the heavy burden of establishing that Petitioners acted intentionally in establishing and maintaining a dual school system. Petitioners, however, argue that despite any intentional segregative actions of the Dayton and Columbus school boards, Respondents should be denied meaningful relief. Petitioners' argument relies on their commitment to a "neighborhood school" system and upon claims that residential patterns and the passage of time have so attenuated any impact their actions could have had as to excuse their prior actions. Petitioners, however, do not demonstrate how these other factors have eradicated the effects of their actions. Rather, they ask this Court to announce a new standard: Within a certain number of years, all vestiges of the discriminatory conduct of school boards either disappears or is subsumed by residential patterns. As *amici* have argued, in the absence of affirmative action to desegregate dual systems, Petitioners can never be heard to claim that the vestiges of their actions have disappeared. Nor, in light of the reciprocal relationship between housing and school patterns, can they ever claim that housing patterns have "covered up" the effects of their discriminatory conduct.

The *amici,* as an organization deeply involved in attempting to eliminate housing segregation, is convinced that the failure to affirm the Sixth Circuit's holdings will intensify and solidify both residential and school segregation nationally. If Petitioners' position is adopted, the Court, *sub silentio,* will not only have overruled *Brown I* but will have eviscerated the Thirteenth and Fourteenth Amendments. Thus, the reality of "two societies—black, white, separate and unequal" will be tragically insured.

For these reasons, *amici* urge affirmance of the opinions of the Sixth Circuit and the immediate implementation of the remedies ordered therein.

Respectfully submitted,

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